# STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 94G114

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# INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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HARVEY W. MARTINEZ,

Complainant,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

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Hearing in this matter was held on August 8, 1995, in Denver before Administrative Law Judge Margot W. Jones. Complainant, Harvey W. Martinez, was present at the hearing and represented by Vonda Hall, Attorney for the Colorado Association of Public Employees. Respondent appeared at the hearing through Steven Chavez, Assistant Attorney General.

The parties called John T. Vickers and Al Shablo, employees of the Department of Transportation (Department), to testify at hearing.

The parties stipulated to the admission of Respondent's exhibits 5 through 10. Respondent's exhibit 2 was offered into evidence and later withdrawn. Complainant's exhibit A was admitted into evidence without objection.

# PRELIMINARY MATTERS

Complainant has the burden of proof to establish that Respondent's action was arbitrary, capricious or contrary to rule or law.

# MATTER APPEALED

Complainant appeals a 4th step grievance decision pertaining to the use of leave during November to April for employees assigned to the Durango, CO office of the Department.

#### ISSUE

- 1. Whether Respondent's decision was arbitrary, capricious or contrary to rule or law.
- 2. Whether Complainant is entitled to an award of attorney fees and costs.

# STIPULATIONS OF FACT

The following is a stipulation of fact entered into by the parties on August 8, 1995. The witness statements referenced in the stipulation of fact were considered, along with the evidence presented at hearing.

- 1. Complainant, Harvey W. Martinez (Martinez), initiated a grievance on or about March 28, 1994, by filing a written grievance with Jon "Ted" Vickers, Maintenance Superintendent (Vickers). Both Martinez and Vickers are employees of Respondent, Colorado Department of Transportation. The subject of that grievance was the unwritten policy relating to annual leave which applied to Martinez. A copy of that grievance is Stipulated Exhibit 1 and is incorporated herein. Vickers denied the grievance.
- 2. The grievance was presented to the appointing authority, A. Shablo (Shablo), by letter dated April 13, 1994. A copy of that letter is Stipulated Exhibit 2 and is incorporated herein.
- 3. Shablo responded to the grievance by letter memorandum dated May 9, 1994, a copy of which is Stipulated Exhibit 3 and which is incorporated herein, denying the relief requested in the grievance.
- 4. Complainant filed a petition for a discretionary hearing with the State Personnel Board on July 10, 1994. Information sheets were timely filed by the parties and the preliminary Recommendation of the Administrative Law Judge ("ALJ") was to grant a hearing. The State Personnel Board adopted the recommendation of the ALJ and granted a hearing.
- 5. The Colorado Department of Transportation is divided into districts, each headed by a Regional Transportation director, who is appointing authority for that district. The appointing authority for District V is A. Shablo. Maintenance District V includes the Durango and Alamosa sections.
- 6. Pursuant to an unwritten policy, all requests for extended annual leave are denied from November 1 of each year through April 30 of the following year to all employees holding positions of highway maintenance worker I and II (nonexempt under the FLSA) in the Durango section. Extended leave is defined as not being away from the work area for more than five days, for example, three working days of a week plus the two days of the weekend. Employees holding positions of foreman or higher (exempt from the FLSA) are permitted to take annual leave at any time without any restrictions as to length. However, since November of 1993 none of the aforementioned employees has been granted annual leave in excess of forty eight (48) hours, exclusive of weekends, from

November 1 through April 30 of both of those years. See Stipulated Exhibit 4 (lists the overtime eligibility status for employee of the Durango maintenance section) and 5 (time records of the exempt employees for November 1 through April 30 of 1993 and 1994), attached hereto and incorporated herein.

- 7. The employees in all positions in the Alamosa section are permitted to take extended annual leave at any time in the year.
- 8. Complainant has been denied leave under the unwritten policy described in paragraph 6.
- 9. Charles L. Kennedy, James H. Simmons, Michael D. Foulk, Ervin L. Markey, and Larry D. Jones area all highway maintenance workers I and II, assigned to the Durango section who have been impacted by the annual leave policy described in paragraph 6. It is agreed that the employees would testify in conformity with their written statements, which are attached hereto and incorporated herein as Stipulated Exhibit 6 through 10. However, Complainant reserves the right to call them as rebuttal witnesses.

# FINDINGS OF FACT

- 1. The Department's leave usage policy in the Durango area has been the same for 30 years. The Department maintains different leave policies in the Alamosa and Durango areas because the snow conditions in the Durango area are more severe than the conditions in the Alamosa area. The Alamosa area is not in a major snow belt while the Durango area is in a major snow belt. Between November and April, the Alamosa area averages 100 inches of snow while the Durango area averages 700 inches of snow.
- 2. In the Durango area, roads are closed due to heavy snow fall 10 times more often than in the Alamosa area. Further, there are numerous cities and towns in the Durango area which are totally cut off from the rest of the state due to heavy snow fall. This necessitates immediate response by Department staff in the Durango area to clear roads making these areas accessible.
- 3. In the Alamosa area, the city of South Park is the only area that has the potential to be cut off from the rest of the state due to heavy snow fall.
- 4. Avalanches are a major danger in Colorado mountain areas. Avalanche shoots are located in mountainous areas where avalanche dangers are highest. Avalanche shoots allows Department personnel to control the occurrence and direction of avalanches.
- 5. Avalanches block major highway passes in the Durango area. Department personnel who cause avalanches are assisted by other Department workers who control traffic and clean highways.

Because of the heavy snowfall in the Durango area, there are 200 avalanche shoots. In the Alamosa area, there are 15 avalanche shoots.

- 6. Durango personnel are authorized to hire additional temporary employees. Hiring additional temporary employees would alleviate some of the necessity to impose a leave usage freeze in the Durango area from November through April. However, Department managers are unable to consistently employ the quantity of temporary employees needed to maintain the highways in this area in a safe manner. The work force willing to work on the highways in this area is inadequate.
- 7. Prior to 1990, Alamosa and Durango had the same leave usage policy. Alamosa employees were subject to the same ban on leave usage from November to April each year. The employees petitioned for a change in the policy because their weather conditions did not warrant the leave usage ban from November to April. Management agreed and lifted the ban on leave usage in this area.
- 8. Supervisory personnel in the Department are FLSA exempt. In the Durango area, the leave usage ban does not apply to supervisory personnel. The leave usage ban does apply to Martinez and other non-supervisory personnel.
- 9. The basis for the distinction between non-supervisory and supervisory personnel is that the supervisory personnel are not paid for working overtime, they are on duty 24 hours a day, seven days per week and a supervisor is required to be on duty whenever non-supervisory personnel are on duty.
- 10. Routinely, supervisory personnel are called upon during snow emergencies to work overtime. They receive compensatory time for their overtime hours worked and the leave usage policy is not applied to them.
- 11. Because of the significant road hazard in the Durango area, Department managers in the Durango area are scrutinized closely for their handling of snow emergencies. The occurrence of highway fatalities among members of the public and Department staff working on the road makes road conditions of widespread interest and concern.

### DISCUSSION

This case turns on the powers of an appointing authority to establish vacation policies. Rule R1-4-3 (January 1, 1986), 4 Code of Colo. Reg. 801-1, states in part:

The appointing authority has the power to appoint an individual to a position, assign duties, evaluate performance, as well as

administer corrective and disciplinary action, including termination, in accordance with these rules. In addition, the appointing authority shall have the following powers:

- (A) The appointing authority shall designate the location of work for positions under his authority; and determine the tools and equipment to be furnished.
- (B) The appointing authority shall set the hours of work and the working conditions. . . .
- (D)In addition, the appointing authority shall exercise those powers, and fulfill those responsibilities, specified elsewhere in these Rules and in the Director's Procedures.

. . .

Director's Procedure P7-1-1, (September 1, 1989), 4 Code of Colo. Reg. 801-2, states:

All employees in the classified system shall be treated equally with regard to the conditions and usage of annual leave. All employees eligible to earn such leave are encouraged to utilize a portion of this leave each year. Appointing authorities shall grant leave on the basis of the work requirements of the agency after conferring with employees and recognizing their wishes where possible.

Director's Procedure P7-1-6, (September 1, 1989), 4 Code of Colo. Reg. 801-1, states in part:

<u>Use of Annual Leave</u>. Annual leave may be taken only when authorized by the appointing authority, who may establish periods during which no annual leave may be taken. . . .

Respondent is entitled to a presumption of administrative regularity and constitutionality with respect to its personnel actions, Chiappe v. State Personnel Board, 622 P.2d 527, 532 (Colo. 1981). This presumption cannot sustain an administrative action which is arbitrary, capricious or contrary to rule or law. The capricious or arbitrary exercise of discretion by an appointing authority can arise in three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration to the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such a manner that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. Van de Veqt v Board of Commissioners of Larimer

County, 55 P.2d 703, 705 (Colo 1936).

There is no arbitrary or capricious action with regard to the Department's leave policy in the Durango area. The different treatment of Alamosa and Durango employees, and supervisory and non-supervisory personnel is solidly based on identifiable criteria which makes sense in light of the weather and road conditions in the Durango area and the service rendered by the Department.

There was no evidence presented at hearing which would support the conclusion that Complainant should be awarded attorney fees.

#### CONCLUSIONS OF LAW

- 1. The step 4 grievance decision was neither arbitrary, capricious nor contrary to rule or law.
- 2. Complainant is not entitled to an award of attorney fees.

# ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

DATED this	day of	
September, 1995,	at	Margot W. Jones
Denver, Colorado		Administrative Law Judge

#### CERTIFICATE OF MAILING

This is to certify that on this \_\_\_\_\_ day of September, 1995, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Vonda G. Hall Attorney at Law Colorado Association of Public Employees 1390 Logan Street, Suite 402 Denver, CO 80203

and in the interagency mail, addressed as follows:

Steven Chavez
Assistant Attorney General
Department of Law
Natural Resources Section
1525 Sherman Street, 5th Fl.
Denver, CO 80203

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#### **NOTICE OF APPEAL RIGHTS**

#### EACH PARTY HAS THE FOLLOWING RIGHTS

1.To abide by the decision of the Administrative Law Judge ("ALJ").

2.To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

#### RECORD ON APPEAL

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is \$50.00. The estimated cost to prepare the record on appeal in this case with a transcript is \$360.00. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

### **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief

must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.

#### **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

#### PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.